

HOUSE
RESEARCH

ORGANIZATION bill analysis

5/10/89

Santiesteban, et al. (Guerrero)
(CSSB by Guerrero)

SB 489

SUBJECT: Continuing the Texas Department of Agriculture

COMMITTEE: Government Organization: committee substitute recommended

VOTE: 8 ayes--Gibson, Finnell, Granoff, Guerrero, A. Hill, P. Hill, Schlueter, A. Smith

0 nays

1 absent--Eckels

SENATE VOTE: On suspending regular order, March 20 -- 24-5 (Armbrister, Bivins, Krier, Ratliff, Sims)

WITNESSES: For--Agriculture Commissioner Jim Hightower; Willie Nelson; Barbara Jordan; John Hildreth, Consumer's Union; Harold Bob Bennett, Texas Corn Producers Board; Casey Bergen, Citizens Against Pesticide Misuse; Minnie Lou Bradley, B3r Country Meats, Inc.; Robert Hartley, Texas Farmers Union; DeDe Armentrout, National Audubon Society; Ken Kramer, Sierra Club; Rebecca Flores Harrington, United Farmworkers Association; Rebecca Lightsey, Texas Consumers Union; and eight others. (Eighty six other individuals registered in support.)

Against--Ed Small, Texas and Southwestern Cattle Raisers Association; Joe Maley and Deborah Gillan, Texas Farm Bureau; Kenneth Boening, Associated Milk Producers, Inc.; Carllyn Walker, Texas Cattle Women; Karen Peterson, Texas Agri-Women; Reed Lang, Texas Citrus Mutual; D. Keith Chapman, Livestock Marketing Association of Texas; Charles Carter, Independent Cattlemen's Association; Clifford Hoelscher, St. Lawrence Cotton Growers Association; David Oefinger, Trans Pecos Cotton Growers; Wes Bonner, Texas Cattle Feeders Association; and five others. (Thirty-eight other individuals registered against)

On--Buck Wynne III, Texas Water Commission; Dennis Baker, Texas Department of Health

BACKGROUND: The Texas Department of Agriculture was established in 1907. The agency is responsible for encouraging the development of agricultural methods and practices in Texas, investigating plants and diseases, increasing

demand and broadening markets for Texas agricultural products, compiling statistics and other information, and working with state and federal agencies and other countries for the benefit of Texas agriculture. The department runs various regulatory programs, including one governing agricultural pesticide and herbicide use, and a marketing program for Texas products.

Agriculture Code Chapter 11 states that the department is under the direction of the commissioner of agriculture, who is elected for a four-year term. The chapter says the commissioner must be an experienced farmer, must post a bond and must appoint a deputy commissioner, who also must post bond. The same chapter provides that the department must undergo review under the Sunset Act and that unless continued by the Legislature the department is abolished and Chapter 11 expires Sept. 1, 1989.

The department was reviewed recently by the Sunset Advisory Commission, which recommended that it be continued until 2001. While the commission made no recommendations regarding a change in how the commissioner is chosen, and the issue was not addressed in the bills heard in committee, proposals to make the post appointive has been debated widely and were addressed by many of the witnesses at hearings on the bill.

DIGEST:

CSSB 489 would continue the Texas Department of Agriculture until Sept. 1, 2001. The bill would create new statutory authority to enforce agricultural laws, modify the department's pesticide regulatory program and alter the administration of certain programs. CSSB 489 would also authorize the department to pay claims under the Produce Recovery Fund involving bankruptcy.

Violators of the pesticide and herbicide law would be subject to new and increased administrative and civil penalties. The department could also use a range of penalties such as license suspension or revocation. Misdemeanor penalties would be made to conform to those in the Penal Code. The department could assess administrative penalties up to \$2,000 for a violation of the pesticide or herbicide law. The penalty would be limited to \$4,000 per incident. New administrative fines could be assessed for violations of the weights and measures, grain warehouse, quarantine and other laws. The bill would establish criteria for setting

finer for administrative penalties, as well as procedures for contesting fines. CSSB 489 would also increase the maximum civil penalty for a violation of the department's pesticide law. The penalty could be between \$50 and \$10,000 for each violation and up to \$15,000 for all violations related to a single incident. New and increased civil fines could be assessed for violations of the general quarantine, citrus, vegetable plant and other laws. The department would have authority to seek injunctive relief through the attorney general or appropriate county or district attorney.

The bill would also replace the misdemeanor penalty provisions with the designation as Class A, Class B, or Class C misdemeanors.

CSSB 489 would increase the minimum insurance requirements for commercial pesticide applicators to \$100,000 each for property damage and bodily injury and modify regulations pertaining to private pesticide applicators. The bill would also facilitate cooperative efforts between the department and other state agencies charged with regulating pesticides.

CSSB 489 would establish a Pesticide Advisory Board, which would review and comment on proposed pesticide regulations before they were adopted. The board would consist of the commissioners of agriculture and health, and the director of the Texas Agricultural Extension Service as ex officio members. The commissioner of agriculture would appoint six members to represent agricultural production, the chemical industry, commercial pesticide applicators, environmental protection, consumer issues, agricultural labor, and health care expertise related to pesticides. The commissioner could appoint additional members to provide expertise on a proposed rule.

The bill would require employees who apply restricted-use or state-limited-use pesticides for a commercial applicator to be subject to the same licensing requirement as the commercial applicator. It would also require private applicators to be licensed in order to use these pesticides. License requirements would include a training course conducted by the Texas Agricultural Extension Station, in cooperation with the department, and a nonrefundable fee of \$50. The license would expire in five years. Private

applicators certified by the department's voluntary program prior to Jan. 10, 1989 would be exempted from the training requirement for five years.

The department would be required to consult with the Texas Water Commission to assess a pesticide's impact of water quality before it was placed on the list of state-limited-use pesticides. The department could not adopt rules to enhance water quality or to store and dispose of pesticides if the rules were inconsistent with the water commission's rules. The department could adopt rules or establish programs for pesticide regulation necessary to comply with federal requirements.

The department would be directed to bring fees in line with administrative costs by submitting a fee schedule for its regulatory programs, with the goal of recovering all direct costs of administering the program. For the fiscal bienniums ending Aug. 31, 1993 and Aug. 31, 1995, the fee schedules would have to recover 50 percent of all direct costs, except for programs exempted by the department because increased cost recovery would be contrary to the program's purpose. CSSB 489 would authorize membership fees up to \$50 for programs to promote products grown or made with ingredients grown in the state.

The bill would designate certain certification, license and registration fees as nonrefundable. It would also authorize a fee schedule for late renewal of a license or registration. The late fee would be 20 percent of the renewal fee if an application were submitted within the 30 days, 50 percent of the renewal fee if between 31 and 91 days, and 100 percent of the renewal fee if between 91 and 365 days.

The department would have to inspect weights and measures, and nursery/floral businesses only once every three years, rather than annually. It would be required to inspect weights and measures used by a state institution as often as requested by the State Purchasing and General Services Commission or other governing body. The bill would grant authority to the department to examine invoices and other documents related to the shipping and receiving of items found to be infested with pests or plant disease, or shipped in violation of state or federal laws.

The bill would allow the department to pay legitimate claims out of the Produce Recovery Fund even though the licensee involved was in bankruptcy.

General Sunset Commission provisions on public meetings, conflict of interest, financial reports and other issues would be added to the department's authorizing statutes in the Agriculture Code.

SUPPORTERS
SAY:

CSSB 489 is a carefully crafted continuation of the state agency devoted to the promotion and regulation of one of the foundations of the state economy -- agriculture. To maintain the accountability and the visibility needed for the commissioner of agriculture, the bill would continue the practice of more than 80 years and keep the position elected by the people.

An elected official is subject to closer scrutiny than appointed officials. Electing the agriculture commissioner allows everyone who grows, picks, sells and eats agricultural products a voice in the process. It forces the commissioner to respond to all of these interests, rural and urban, producer and consumer.

The appointment process is hardly free from politics, and appointees tend to be insulated from the needs and desires of the people they serve. The the case of the commissioner of agriculture, it would allow a few special interests to focus on swaying the governor and a few senators rather than addressing all the citizens of the state. The issue of elected versus appointed is a recent tempest, targeted at the present commissioner and so shortsighted that it does not look beyond the current administration of the department.

The department's current administrative and civil penalties in the area of pesticide regulation are inadequate compared to other state environmental agencies and federal law. The higher maximum civil penalty would make it more feasible for the attorney general to prosecute pesticide cases in a cost effective manner. CSSB 489 would change the structure of these fines to align them with reality. The fines provided in the original version of the bill would have wiped out many competent businesses.

The enforcement structure for the department's other regulatory programs is not sufficient to ensure

compliance. The changes proposed in this bill would provide a wider range of enforcement tools. The civil penalty authority would require a less stringent standard of proof than criminal cases, allowing for more effective enforcement. The penalty amounts for these programs would be comparable to those in other states and reflect the severity of the violation.

Making the department's penalties consistent with the Penal Code would reduce any confusion regarding which set of penalties to apply and would automatically be updated by changes in the Penal Code.

Pesticide regulation has historically involved a number of interested parties with strongly held beliefs. The pesticide advisory board, with its diversified membership, would allow the department to balance the different interests in regulating pesticides.

The Environmental Protection Agency and the Texas Department of Agriculture have classified certain pesticides as "restricted-use" and "state-limited-use" because of their potential to injure people and damage the environment. The bill would ensure that applicators working "under supervision" of commercial applicators are adequately trained. Further, it attempts to ensure a greater level of competency for private applicators than is currently provided by the voluntary certification program.

The department currently does not recover a majority of the costs of administering its regulatory programs, and it has no systematic review of its fee levels. Implicit in the proposed changes in the fee schedule is the need to justify the level of fees within the program. New areas of fee authority require particular industries or individuals that benefit from programs run by the department to help support the costs of these programs. The non-refundable fee provisions would allow the department to recover the costs of the technical expertise and time spent processing applications for licensure or certification that are later withdrawn or rejected. CSSB 489 would also provide an incentive for timely license and certification renewal that would decrease the amount of paperwork required by late renewals and assist the department in maintaining accurate records.

Annual inspections in the weights and measures and nursery/floral programs would reduce the department's ability to concentrate on problem areas. Removing the annual inspection requirement would allow the department to target its inspection to ensure compliance.

The Produce Recovery Fund was established to pay producers to help offset losses from bad transactions. This bill provides for a payment that would not be denied because the licensee involved declares bankruptcy.

CSSB 489 does not require the department to go through the bureaucratic hassle of formalizing cooperative efforts between itself and other state agencies. No problem exists that needs to be fixed by more formal relations between agencies.

OPPONENTS
SAY:

The Agriculture Department has become too political, and steps should be taken during the sunset process to address this problem. Instead of a commissioner knowledgeable about agriculture, the current process produces a politician. Electing the commissioner no longer serves the agricultural interests of the state. Campaigning requires a concentration on urban areas where there are more votes but few farmers and ranchers.

The politicization of the department was evident in the incumbent commissioner's recent involvement with the European beef boycott. The commissioner went against the majority of the Texas beef industry when he lent credibility to the unscientific theory that hormone-fed beef was unsafe. In other areas, assistance for regular agricultural products has been replaced by efforts to promote "pipedream" crops.

Pesticide enforcement should be a health issue; unfortunately, it has become a political one. The regulatory efforts have not been fair and equitable. The sunset process is the ideal time look to the future of how the regulatory efforts should be organized. CSSB 489 falls short of depoliticizing this area.

The regulatory scheme proposed by this bill would consolidate too much power and authority in one individual. The commissioner would be legislator (making the rules), policeman (enforcing them), and

judge (setting and collecting the fine). A scientific board is needed, regardless of how the commissioner is selected, to assist in the pesticide regulatory efforts. Unfortunately, the Pesticide Advisory Board that would be established by this bill would be mere window dressing with no authority to make or change policy. All appointments are made by the commissioner, and there would be no assurance that interested parties would have input into pesticide regulations made by the department.

The proposed penalty structure would provide too much discretion for the department and would increase the potential for abuse. More administrative and civil penalties are not needed. The Legislature should provide a penalty schedule based on the severity of the violation.

The appeals process for contesting administrative penalties would presume an individual was guilty until proven innocent. It would require the person to place the amount of the fine in escrow or post a supersedeas bond. If the person was financially unable to meet these provisions, an affidavit would have to be submitted in support. Failure to do either of these three options would result in a waiver of all legal rights to judicial review.

The bill does not address any of the extensive formalized cooperation and coordination efforts between the Department of Agriculture and the Department of Health, and with Texas A&M University. The agriculture and commerce departments share economic development responsibilities, but no effort has been made to define the division of those responsibilities or to ensure that cooperation continues in the future. Some overlap and potential for conflict exists between the department and the Texas A&M Extension Service and Experiment Station. Some effort should have been made to coordinate their efforts so that the agricultural community receives the best assistance and advice possible.

The bill would go too far in setting requirements for applicators. Commercial applicators are already required to take responsibility for their employees. Requiring the employee to meet the same requirements as his supervisor is overkill. The Sunset Commission's recommendations would have created a "licensed

technician" status for these applicators that would require them to receive some formal and in-service training before being allowed to use dangerous pesticides, but not to the same extent of a commercial applicator.

OTHER
OPPONENTS
SAY:

The maximum administrative penalties for violation of pesticide laws would still be too low. Other state agencies and the federal government have maximum penalties of \$10,000 per day, per violation and \$5,000 per violation, per day, respectively, and do not place a cap per incident. Pesticides present a sufficient threat to public health to justify tougher fines as a deterrent to abuse.

Requiring private applicators to be licensed is an important first step. Unfortunately this bill would not require any test to ensure competence, only the completion of a training course.

NOTES:

The bill should at least provide stricter qualifications for the commissioner of agriculture to ensure that the position is filled by someone with a working, intimate knowledge of the area. CSSB 489 differs in a number of ways from the version passed by the Senate. The committee substitute would address issues not considered by the Senate, including increasing the minimum insurance requirements for pesticide applicators; removing the department's responsibility to regulate pesticides to protect ground water; and authorizing the examination of records to trace the shipment of diseased or infested plants. The committee substitute would prevent a civil penalty from being collected when an administrative penalty was sought; exempt private applicators certified before Jan. 1, 1989 from any new license or regulatory requirements; and require the department to adopt a schedule of penalties as part of its rules.

A related measure, HJR 111 by Gibson, filed May 5, proposes a constitutional amendment providing that the Agriculture Department is under the direction of the commissioner of agriculture, has the duties and powers granted by the Legislature, which is also to establish qualifications for the office.